Tagging or Not?—The Constitutionality of Federal Labeling Requirements for Internet Web Pages

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I. INTRODUCTION

As the Internet[1] gains popularity with adults, so it gains popularity with children.[2] Parents and social advocates are becoming increas-

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* I would like to thank Professor Michael Froomkin from the University of Miami School of Law for his guidance and advice throughout the writing of this paper, as well as Louis Archambault for his assistance. This paper reflects technical and legal research as of June 1997.

[1] The Internet is the most well-known and largest network. *See* Richard Dennis, *Guide to Selecting an Internet Provider,* 2 ENVTL. L. 571, 572-73 (1996) (defining the Internet as a network that connects networks throughout the world, often described as "a network of networks"); A. Michael Froomkin, *Towards An Internet Jurisprudence* (1997) (stating that the Internet does not exist as a place but as an interconnection of millions of computers) (unpublished article on file with author).

A network is a system consisting of any combination of computers, printers, audio, visual, display devices, or telephones interconnected by telecommunications equipment. *See* Ari Stainman, *Shielding Internet Users from Undesirable Content: The Advantages of PICS Based Rating System,* 20 FORDHAM INT'L L.J. 866, 918 n.2 (1997) (citing Anthony Cataldo, *IBM Eyes Embedded Market: Hedging Against Possible Loss of Apple to Intel,* ELECTRONIC BUYERS' NEWS, Mar 3, 1997, at 16). "A dedicated broadband telecommunications connection, known as the backbone, linking together host computers comprises the Internet." *Id.* "A dedicated connection is one that is always active [and a] broadband connection is one that can transmit large amounts of data simultaneously." *Id.* Host computers are computers that maintain a connection to the backbone. These host computers are part of a network and maintain connections to other computers that in turn, maintain connections to other computers. A computer joins the network via dedicated telephone lines, or as

ingly concerned about children's ability to access indecent images and text on the Internet. Consequently, organizations such as Enough is Enough and The Salvation Army have supported Congress' recent attempt to regulate speech on the Internet[3] via the Communications Decency Act ("CDA").[4] These groups seek to prevent minors from ac-

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is typical with user from home, through home telephones. The common feature among all participants on the Internet is their willingness to use the same transmission language: Transmission Control Protocol/Internet Protocol (TCP/ICP). The result is an international collection of connected computers with communication among the users. *See id.* at 871-75.

[2] The rate of growth on the Internet has been exponential, leading Newsweek magazine to declare 1995 as the year of the Internet. *See* Steven Levy, *The Year of the Internet*, NEWSWEEK, Dec. 25, 1995, at 21. In 1981, only 213 host computers were linked on the Internet. Ten years later there were 400,000 computers and five years after that, the Internet linked over 9.4 million computers. This number continues to increase rapidly. It is estimated that there are over 24 million users in North American and 50 million Internet users worldwide. *See* Kara Swisher, *Internet's Reach in Society Grows, Survey Finds; Internet's Popularity Grows Public Survey Finds,* THE WASHINGTON POST, Oct. 3, 1995, at A1.

[3] On December 6, 1996, the U.S. Supreme Court granted the appeal of Reno v. ACLU, 117 S. Ct. 554 (1996). On January 21, 1997, *Enough is Enough,* filed an amicus curiae brief in support of the appellants in this case. (visited Mar. 1. 1996) <*http://www.cdt.org/ciec/SC_appeal/ 970121_EIE_brief.html.*> Other signatories of the brief were: Childhelp USA, Citizens for Family Friendly Libraries, Computer POWER Corporation, D/REX Investigative Consulting, Family Friendly Libraries, Focus on Family, Help us Regain the Children, JuriNet Inc., Kidz Online, Laura Lederer, J.D., Log-on Data Corporation, Legal Pad Enterprises, Inc., Mothers Against Sexual Abuse, National Association of Evangelicals, National Coalition for the Protection of Children and Families, National Council of Catholic Women, National Political Congress of Black Women, Inc., Omaha for Decency, One Voice/The American Coalition for Abuse Awareness, Oklahomans for Children and Families, Religious Alliance Against Pornography, The Salvation Army, Victims Assistance Legal Organization, Inc., Wietzman, Lenore, Ph.D., and WheelGroup Corporation. This large group of supporters is an indication of the enormous concern over children's access to indecent and obscene images and text on the Internet.

[4] Title V of the Telecommunications Act includes the Communications Decency Act of 1996. *See* 47 U.S.C. § 223(a)(1)(b), (d). The 104th Congress amended the Communications Act of 1934. *See* 47 U.S.C. § 223 (1988 & Supp. V 1993) (Codified as amended at 47 U.S.C. § 223(a)-(h) (1996)). In its effort to protect children, the CDA forbids using telecommunication devices, including computer networks, to make material deemed to be obscene and indecent available to persons known to be

cessing sexually explicit, degrading and offensive information on the Internet.[5] In contrast, groups desiring absolute free speech protection of the Internet, such as the American Civil Liberties Union ("ACLU"), argue that the legislature's desire to regulate information dissemination on the Internet to minors comes at a cost to adults,[6] and thus violates the First Amendment.[7]

Two methods for "filtering" the Internet are "fencing in" and "fencing out." Fencing in requires setting up a "place" on the Internet that children can access which only contains material deemed appropriate for children. Fencing out requires labeling the web pages on the Internet and using a blocking system to filter according to those ratings. This paper will deal solely with the "fencing-out"option of Internet labeling.

Blocking or filtering access to the Internet requires two steps.[8] One must first determine that an Internet address contains undesirable

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under the age of 18. *See* 141 Cong. Rec. § 9770 (July 12, 1995) (Memorandum of Opinion in Support of the Communications Decency Amendment as Adopted by the U.S. Senate on June 14, 1995 by the National Law Center for Children and Families). The CDA imposes criminal liability on anyone who uses a computer network to transmit "indecent" or "patently offensive" material, even if constitutionally protected, without regard to who initiated the communication. *See* 47 U.S.C. § 223(a)(1)(B), (d)(1). Penalties include jail sentences of up to five years and penalties of up to $250,000.

[5] These groups and coalitions signed the amicus curiae brief filed for Reno v. ACLU. *See supra* note 3.

[6] In response to the passage of CDA, the ACLU and John Shea, publisher of an electronic newspaper, successfully challenged the constitutionality of two provisions within § 502 that amended 47 U.S.C. §§ 223(a) and 223(d). The United States District Court deemed CDA § 223(a)(1)(B), (a)(2) facially unconstitutional to the extent they restrict indecent communication. The court also found §223(d)(1)-(2) facially unconstitutional. *See* American Civil Liberties Union v. Janet Reno, 939 F. Supp. 824, 827 (E.D. Pa. 1996). Further, both Shea and the ACLU obtained preliminary injunctions against the temporary enforcement of the CDA provisions until the U.S. Supreme Court has reviewed the case.

[7] *See* American Civil Liberties Union's Supreme Court brief for Reno v. ACLU. (visited Mar. 1, 1996) <http: //www.cdt.org/ciec/SC_appeal/970220_brief.html.>

[8] *See* Arman Danesh, *Net Nannies Raise Protective Screens,* S. CHINA MORNING POST, Oct. 29, 1996, at 2 (stating that the rating system labels content based on criteria such as nudity and violence); *Internet Access Controls Without Censorship, PICS*

content.[9] Then one must prevent access to the content.[10] This paper proposes a statute that achieves both steps. The statute proposes that Congress grant the Federal Communications Commission ("FCC") the power to develop the technological means for labeling web pages on the Internet (step one) and the power to provide a means to block or filter the information (step two). Congress should not dictate the FCC's actions, but simply list the goals the FCC should achieve. The federal statute could read as follows:

> The Federal Communications Commission shall create a special commission to study, research, develop and mandate minimum technical standards for screening software and labeling/rating software on the Internet.
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> The goals of the Special Internet Communications Commission shall be:
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> 1. To provide parents a means to control what information their children receive on the Internet;
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> 2. To balance the freedom of communication on the Internet with:
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> a) The government's compelling interest of protecting children from indecent or obscene material; and
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> b) The interest of allowing parents to control what information their child has access to;
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> 3. To develop the minimum technical standards for screening software to be implemented by parents who wish to filter the information that is received in their home;
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> 4. To develop a means where the screening software successfully filters the information that a parent wishes to receive in the home. Thus, a rating/labeling system is necessary to successfully implement a screening/filtering program. The Commission is responsible for developing a rating or labeling classification whereby a web page composer on the

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(visited April, 1997) <http://www.w3.org/pub/WWW/-PICS/iacwcv2.htm> (indicating that rating Internet content involves using a term or set of terms to describe type or category of content).

[9] *See* Danesh, *supra* note 8. Methods of determining whether an Internet address contains undesirable content include word or character searches, prompting or a rating system. *See,* Stainman, *supra* note 1, at 881-884

[10] *See* Danesh, *supra* note 8.

> Internet can place a label on her page that can be read by the screening software. The Commission need not impose those standards but must only provide a system of rating/labeling. This will allow parents to choose whether they wish to filter their access according to the Commission's rating scheme or will choose another system of classification. However, the Commission must develop the minimum technical standards for a rating scheme that is to be used by Internet web page composers in order to successfully implement the screening programs;
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> 5. To develop a means whereby information providers on the Internet will be required to place descriptive labels on their pages or allow a third party to rate the pages.

The proposed statute is necessary to meet the government's compelling interest of protecting children from indecent or obscene material and allows a parent to control the information to which the child has access. The proposed statute provides parents the option of using a software program that will read web page labels and block those sites deemed undesirable. Thus, while the child will not gain access to the blocked sites, the parents' use of the Internet will not be restricted, and the restrictions will not violate the First Amendment's protection of free speech.

Part one of this paper describes how a web site can be labeled to effectuate the proposed statute's goals. This section describes both the labeling and the filtering or blocking software necessary to effectively implement the proposed statute. These software systems would allow a user to filter out information on the Internet that the user deems personally undesirable.

Part two of this paper argues that the proposed federal statute is constitutional. The statute is a content-neutral statute narrowly tailored to meet the government's compelling interest of protecting minors from accessing information their parents deem offensive, indecent or obscene. The proposed statute allows parents to choose what information their children will access, but does not restrict the content of the web site nor the parent's use of the Internet. The statute would allow parents to disable a minor's ability to freely navigate the Internet and prevents access to sites deemed undesirable. Furthermore, the proposed statute parallels the government's use of informative labeling of cigarettes and alcohol as well as compelled disclosure in securities regulation.

II. TECHNOLOGICAL CONSIDERATIONS OF INTERNET LABELING

A. *Labeling and Filtering: An Example*

The Internet is a unique form of communication because it combines various features of traditional media.[11] The significance of the Internet is its promotion of: 1) the proliferation of interconnected public data networks following a common standard; 2) the widespread trend to use these networks for delivery of a wide range of material (including phone calls, electronic mail, and video); and 3) the increased blurring of distinctions between media as digital communication over networks.[12] While recognizing this uniqueness and significance, Congress has struggled over how to regulate the Internet and how much freedom to allow.

The Internet serves as a source of information on virtually any subject, similar to newspapers, magazines, radio and television. However, unlike these traditional forms of media, the Internet is interactive,[13] requires the use of domain names,[14] transmits information instantly through a network,[15] and is accessed through various means.[16]

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[11] *See* Stacey J. Rappaport, *Rules of the Road: The Constitutional Limits of Restricting Indecent Speech on the Information Superhighway,* 6 FORDHAM. INTELL. PROP. MEDIA & ENT. L.J. 301, 307 (1995).

[12] Richard Reynolds, "The Definition of the Internet" Sat. Jun 28 15:53:39 1997.

[13] The user must take an active role on the Internet, either choosing from various icons or conducting a word search to retrieve the information he desires. However, as the use of push technology increases, the internet user is becoming more of a passive recipient of information. *See generally*, Kevin Kelley & Gary Wolf, *Push*, WIRED, March 1997, at 12. For examples of push technology, see <http://www.marimba.com> or <http://www.pointcast.com>.

However, the most conventional information retrieval methods require action on the part of the user. A word search requires the user to type in certain words describing the type of information she seeks. For example, if Alice wants Internet recipes for cheesecake, one way she could obtain that information is to type in the word "cheesecake" and activate the Internet search engine, which would retrieve all sites containing this word. Alice then chooses the site she wants to retrieve. Typing the address, or domain name, of the desired web site will immediately access that site. For example, if Bob wants the Department of Justice's Brief, he could type <http://www.cdt.org/cice/SC_appeal/970121_DOJ_brief.html>. Thus, accessing

information on the Internet requires users to take affirmative steps, either by clicking on an icon or typing in the site address. *See, e.g.*, Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 HARV. J.L. & TECH. 495 (1997).

[14] *See* Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/PAT 9, 15 (1995); For a more in depth description of domain names, see Ira S. Nathenson, *Showdown at the Domain Name Corral; Property Rights and Personal Jurisdiction Over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911, 912-913 (1997). A domain name is the Internet equivalent of a home address or a telephone number. *See id.* A domain name is a proxy for the "Internet Protocol" ("IP") address, which is a number not unlike a telephone number, although there is no logical correspondence between the IP number and the domain name. *Id.* Because it is a series of letters and not numbers, domain names are potentially more valuable than numbers as identifiers of companies and goods and services. *See* Arne, *supra*, at 15.

[15] Once on the Internet, users can communicate via bulletin boards, electronic mail, the World Wide Web, Internet relay chat and on-line information. Bulletin boards are usually maintained by system operators known as "Sysops." *See Guide to the Ways and Words of Cyberspace*, TIME, March 22, 1995, at 47. A bulletin board allows users to post messages to other users and categorizes them according to subject, such as political and commercial categories. *See id.* at 42. Electronic mail ("e-mail") allows users to communicate directly by sending messages to each other via an e-mail address. *See* Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 91 (1996). These e-mail messages are either read instantly or stored for future access. *Id.*

A List-server is one of the systems that provides a mailing list allowing subscribers to post messages that are received by all other subscribers. All messages are sent to the List-server, which subsequently distributes them to the list's subscribers.

The World Wide Web is a series of files (web pages) maintained over thousands of servers that are part of the Internet. The use of an Internet communication protocol, called Hypertext Transport Protocol ("HTTP") facilitates the linking of web pages on the Internet by providing a common format. The use of HTTP allows Internet users to browse and search web pages, to access and download text, graphics, video and audio information from a web page, or to leap directly into information on other pages by clicking highlighted text.

Internet Relay Chat ("IRC") is an interactive communication service permitting participants to exchange messages in real time as "live" conversations. IRC "channels" are dedicated to specific subject matter and a senior user normally holds operating privileges within the channel. Real time conferencing allows users instant and simultaneous communication. The users type in their "message" which is goes through a reflector and then is sent to the "partner-user" in real time. *See* Rappaport, *supra*, note 9, at 312; L.A. Lorek, *Dangers Can Lurk in On-Line World: Pedophiles Use Network to Meet Children*, SUN-SENT., Aug. 30, 1995, at 1B.

Cyberspace presents the epitome of the freedom of expression.[17] It is an inexpensive forum accessible by an infinite number of individuals.[18] Proponents of individual rights argue that cyberspace should not be regulated.[19] However, those in favor of cyberspace controls point to possible abuses in cyberspace, such as the use of the Internet to transmit a vast amount of objectionable, indecent or obscene information.[20]

An example of regulating information on the Internet is as follows: Bill, a 14 year-old child accesses the Internet while his mother Ann is in another room. Bill, using a search engine, types in the word "sex". The Internet search engine then lists sites that contain the word "sex." Bill, then, can spend hours clicking on each of these sites. Dave, Bill's 25-year old brother, also accesses the Internet and types in the word "sex". Dave accesses the same information Bill did.

The proposed statute would allow the Special Commission to develop the minimum requirements for screening and labeling programs that would allow Bill's mother to read the statutorily imposed labels and filter out those sites she deems offensive. Yet, because the two programs do not universally censor the Internet, but merely provide a

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[16] *See* E. Walter Van Valkenburg, *The First Amendment in Cyberspace,* 76 OR. L. REV. 319, 320 (1996). University or corporate providers, small dial up bulletin board providers, and large commercial providers such as CompuServe, America Online, Prodigy, Genie and Delphi offer access to the Internet. *See* James Coates, *Jumping On Line: Computer Networks Offer a Wealth of Information, and a Chance to Chat,* ST. LOUIS POST-DISPATCH, Feb. 16, 1994, at C5. These services charge between $10-20 per month depending upon the amount of time spent accessing the Internet and the scope of the services used. *See* Burke, *supra* note 15, at 90. Navigators such as Gopher, World Wide Web and Mosaic can aid the user in searching the Internet for desired information. *See, e.g.,* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 833 (1996). Individuals can also access the Internet though linked computers at local libraries or through Internet service providers. *Id.*

[17] *See* HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING THE ELECTRONIC FRONTIER 14 (1993).

[18] *See id.* at 13-14.

[19] *See* Michael Johns, *The First Amendment and Cyberspace: Trying to Teach Old Doctrine New Tricks,* 64 U. CIN. L. REV. 1383, 1384 (1996). [hereinafter *The First Amendment and Cyberspace*].

[20] *See id.* at 1385.

means for each individual to filter the Internet for herself, Ann could program the computer so that she and Dave could access any information including information with the word "sex." Thus, Ann's and Dave's use of the Internet would be unrestricted despite the descriptive tags on the web pages.

Without a blocking program, Ann could monitor what Bill accessed by sitting next to him while he worked on the computer or by using a logging program. Ann, relying on the labels required by the proposed statute and using the filtering program to read those labels, can program the software to block any information containing the word "sex" in it when Bill uses the Internet. However, Ann could allow Dave, as an adult, to have unrestricted use, and thus access to any Internet sites he deems desirable.

A successful implementation of the proposed statute relies upon technological means. The Commission would be responsible for developing such a program. The Platform for Internet Content Selection ("PICS") provides a solution to this problem by providing a means to "tag" web pages. PICS is a system for defining and transporting any arbitrary schema. PICS would provide the program that reads labels, but another program must provide the rating scheme. Thus, parents could use PICS to read labels but must choose which PICS-compatible rating system they wish to implement to filter the web pages.

B. *The Development of PICS Labeling and Filtering Programs*

Information transmitted through the Internet carries a header of identifying information. This header, distinct from the content itself, could contain a descriptive label informing the user about the content.[21] PICS is the most developed and best known example of a labeling program using descriptive labels. The World Wide Web Consortium developed PICS as a response to the fear of government-imposed regulation.[22] PICS provides the common format for the labels

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[21] *See id.* at 1633.

[22] *See* Paul Resnick & James Miller, *PICS: Internet Access Controls Without Censorship* (visited Mar. 31, 1997) <http://www.w3.org/pub/WWW/PICS/iacwcv2.htm> [hereinafter *Access Control*]. PICS was developed in 1994 by the World Wide Web Consortium, the body respon-

so that any PICS-compatible filtering software can process or read the PICS-compatible label.[23]

Rating is a process of translating content into a shorthand that describes the site.[24] Currently, there are two heavily-promoted Internet rating systems: SafeSurf[25] and RSACi.[26] These two programs allow content-providers or third parties to rate their own World Wide Web sites in a sophisticated manner. PICS, in contrast, does not dictate the labeling vocabulary, nor who should pay attention to which labels.[27]

PICS works by embedding text labels in the text or image of the documents, but does not evaluate their content.[28] PICS is analogous to specifying the size of a label and where on a package that label should appear, without specifying what the label should say.[29] PICS can work

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sible for developing common protocols and reference codes for the evolution of the Web, with the participation of industry members such as Apple, America Online, AT&T, Microsoft, IBM, Netscape, Prodigy Safe Surf and Time Warner Pathfinder. *See id.*

[23] *See* Michael McGee, *Freedom of Speech,* (visited Feb. 10, 1996) <http://www.btb.mmcgee@vt.edu>.

[24] *See Let the Market Flex its Muscle over "Art"*, GREENSBORO NEWS AND RECORD, Nov. 19, 1996, at A7 (equating rating with labeling).

[25] With SafeSurf, content providers choose from nine values in each of nine categories. The categories are: profanity, heterosexual themes, homosexual themes, nudity, violence, intolerance, the glorification of drug use, other adult themes and gambling. *See* SafeSurf Rating System, (visited Mar. 31 1997) < http://www.safesurf.com/classify/index.html>.

[26] Content providers participating in RSACi rate their own sites along a scale of 0 through 4 on four levels: violence, nudity, sex and language. As of April 15, 1996, content providers have been able to rate their own sites using the RSACi system by completing a questionnaire at the RSACi web site, <http://www.rsac.org>.

[27] *See* Robin Whittle, *Internet Censorship, Access Control and Content Regulation* (visited Feb. 20, 1997) <http://www.ozemail.com.au/~firstpr/contreg> (explaining the PICS system). For a critique of the PICS system, see (visited Feb. 20, 1997) <http://www.junius.co.uk/censorship/faq.html>.

[28] *See* Simon Garfinkel, *Microsoft Censor 1.0* (visited Feb. 15 1997) <http://www.packet.com.80/packet/garfinkel/97/05/index.2a.html> ("PICS rating services and labels are formatted as LISP lists. The services are downloaded with the MIME file type application/pics-service.") PICS places a simple restriction tag on the hypertext markup language (HTML) of the site. *See id.*

[29] *See Access Controls, supra* note 22, at 87.

with any Internet content-exchange technology with an address based on the uniform resource locator ("URL") technology,[30] including the World Wide Web ("WWW"), FTP, and Usenet.[31]

A web page composer, a company providing access to the Internet or an independent examining body can provide a system of labels for the documents.[32] The content-provider could place his rating of the content in the content's address.[33] A web page composer or information provider who wishes to offer a description of his own material can directly embed labels in web documents or send them along with items received from the Web.[34] Independent third party rating services can also rate the content without the consent of the content provider.[35] "For instance, the Simon Weisenthal Center, which tracks the activities of neo-Nazi groups, could publish PICS labels that identify Web pages containing neo-Nazi propaganda. These labels would be stored on a separate server; not everyone who visits the neo-Nazi pages would see the Weisenthal Center labels, but those who were interested could instruct their software to check automatically for those labels."[36] However, it is the filtering software and not the labels themselves that determine whether to allow or deny access. This separation of functions allows for each rating service to provide its own labeling vocabulary.[37]

PICS works by allowing a user, or parent of a child-user, to program the PICS-compatible software to block the categories deemed

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[30] *See* American Reporter v. Reno, 930 F. Supp. 921, 933 (S.D.N.Y. 1996); EDUCATOR'S GUIDE TO THE INTERNET 219 (Mary Sandy ed. 1997) (defining URL as address structure for WWW that other technologies can also use).

[31] *See* ACLU v. Reno, 929 F. Supp. at 838.

[32] *See* Yaman Akdeniz, *The Regulation of Pornography and Child Pornography on the Internet*, 1997 THE JOURNAL OF INFO., LAW AND TECH. 1, 1. [hereinafter *The Regulation of Pornography]*

[33] *See Develop New Software to Come Clean*, PRESSWIRE, Aug 16, 1996. The person rating the Internet would first connect to a self-labeling service and describe the content to the service by filling out an on-line questionnaire.

[34] *See*, Paul Resnick, *Filtering Information on the Internet*, (visited April 15, 1997) <http://www.sciam.com/0397issue/0397resnick.html>.

[35] *See* Terry Shannon, *News Briefs: Platform for Internet Content Selection (PICS)*, DATATRENDS REPORT ON DEC, Mar. 1, 1996, at 2.

[36] Resnick, *supra* note 34.

[37] *See Access Controls, supra* note 22, at 39.

undesirable.[38] When the user tries to access content at a particular site, the software will check the ratings of the content against the list of categories that have been deemed undesirable. The software can check various places for the ratings: a list developed by the particular user or a list developed by a particular or multiple third parties. If the rating of the particular site matches the list of categories the user has deemed undesirable, then access to the site will be denied.

Today, PICS-compatible filtering software blocks out, or filters, only those sites containing a PICS-compatible label. PICS is a positive rating system, blocking any services not rated by a PICS-compatible rating system. For example, assume there exist labels placing circles, squares and diamonds on the header of the page. PICS places only "circle" labels on the headings of the pages. Thus, PICS-compatible filtering software reads only the web pages tagged with a circle and disregards the pages tagged with diamonds and squares. Yet, PICS allows parents to access the sites the parents deem desirable and which are rated under a PICS-compatible rating system (i.e. those tagged with circles). Any unlabeled pages are not read and are automatically excluded or filtered out.

PICS's greatest advantage is that it does not limit what people write on the Internet, only what they choose to read.[39] It is a system of self-censoring.[40] This does not involve any censorship or abridgement of free speech by a state actor. Free speech is protected at the cost of self-censorship.[41] Many major on-line service providers, commercial Internet access providers and software companies have now begun using the PICS system.[42] The availability of numerous rating schemes

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[38] *See* Stainman, *supra* note 1, at 884.

[39] *Id.*

[40] The possibility exists that government could institute national filtering software without citizen awareness of its existence. *See, e.g.*, Scott E. Feir, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM. L. & POL'Y J. 361 (1997).

[41] *See The Top Shelf: Internet Censorship,* THE ECONOMIST, May 18, 1996 at 4.

[42] *See* ACLU v. Reno, 929 F. Supp. at 838 (listing numerous companies that are offering screening programs to their users or consumers, either through the use of a screening program or through the use of parental controls). Of the most widely-used are the following: American Online, AT&T, CompuServe, Delphi Internet Services,

provides a choice for users in organizing and monitoring what they receive over the Internet. The technology allows for more than one rating system. Properly implemented, interactive media can accommodate multiple filtering systems, giving users and parents the opportunity to select and block information based on a true diversity of information.[43]

PICS, however, provides a limited remedy for parents who wish to disable a minor's ability to access all types of information on the Internet, because, at this time, web page composers are not required to label their pages. Therefore, a screening program's effectiveness is limited by the lack of a rating system. Consequently, because PICS reads only sites with a PICS-compatible label, a large number of web pages in the United States which are not labeled are blocked. However, under the proposed statute, the United States will mandate web page labeling, thereby reducing the number of web pages excluded from access.

III. CONSTITUTIONAL CONSIDERATIONS OF INTERNET LABELING

The proposed mandatory descriptive labeling statute does not restrict the First Amendment's right to freedom of speech. The proposed statute requires a descriptive label that provides a person, wishing to implement such a filtering scheme, with information on the site's content. This allows parents to determine the scope of their child's Internet access. Further, the narrowly-tailored proposed statute furthers the government's compelling interest in protecting children from exposure to sexually explicit information and allowing parents to control what Internet information their children have access to at home.

IBM, MCI, Microsoft, NEC, NetScape Communications Corp. Prodigy, SafeSurf, Time Warner, Pathfinder and Viacom/Nickelodean. *Id.*

[43] *See* Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1633 (1995).

A. *Free Speech Concerns Within Labeling Law*

Labeling laws raise First Amendment and policy concerns.[44] The scope of permissible government limitation on Internet speech depends in part upon the level of First Amendment scrutiny applied by the courts to laws regulating on-line communications. Labels can be classified as either providing information or as content-restricting. Rating labels play two potential roles. They provide either value-neutral information or non-value-neutral information by conveying approval or disapproval.[45] It is necessary to determine the classification of the labels in order to determine the level of scrutiny the courts would use to analyze the label. If the statue is classified as content restricting, the Court applies a strict scrutiny analysis.[46] If the statute is classified content neutral or informative, the Court applies an intermediate level of scrutiny.[47]

"Congress shall make no law . . . abridging the freedom of speech, or of the press."[48] The interpretation of how the First Amendment will apply to the Internet has recently been the subject of much contro-

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[44] Academics and legislators raised this same issue in the context of government regulation of television violence. For a general discussion of the constitutionality of television violence regulations, see James A. Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299, 1317-1344 (1978) (considering the constitutionality of violence regulation strategies). *See also* Thomas G. Krattenmaker & L. A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1261-96 (1978) (applying First Amendment principles to proposals to prohibit violent material, balance violence, use of blocking system on television and warning advisories).

[45] *See* Diane Roberts, *On the Plurality of Ratings*, 15 CARDOZO ARTS & ENT. L.J. 105, 133 (1997).

[46] *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

[47] *See* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1183 (1997)

> [U]nder intermediate level of scrutiny applicable to content-neutral regulation, [the provision at issue] would be sustained if it were shown to further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restriction did not 'burden substantially more speech than is necessary to further' those interests.

Id.

[48] U.S. CONST. amend. I. The right of free speech is a fundamental right which is safeguarded against state interference by the Due Process Clause of the Fourteenth Amendment. *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

versy. The most recent example was the debate over the constitutionality of the Communications Decency Act ("CDA") that imposed criminal sanctions on individuals who transmitted indecent or obscene images and text over the Internet. The U.S. Supreme Court held that provisions of the CDA which prohibited transmission of obscene or indecent communications by means of a telecommunications device to persons under age 18, or the sending of patently offensive communications through use of interactive computer services to persons under age 18, were content-based blanket restrictions on speech, and, as such, the provisions were unconstitutional under the First Amendment.[49] The Supreme Court further held that the CDA was not narrowly tailored to meet the U.S. government's interest because the Government was unable to explain why the less restrictive alternative of tagging on the Internet was not as effective as the CDA.[50]

B. *Labeling: Informative or Content-Restrictive?*

If a content-restricting statute limits what a speaker may say or what a listener may hear, it amounts to censorship. In contrast, an informational statute provides additional facts to the listener, reader or user about the communications. Consumers, for example, use ratings as guideposts for making informed decisions about the use of several media technologies.[51] Congress can constitutionally require mandatory descriptive labeling of web pages if the purpose of the statute is to provide information to the user because it does not violate freedom of speech under the First Amendment.[52]

Several important principles guide the Supreme Court's analysis of First Amendment issues. The first principle is that speech, in whatever form, should be unimpaired by the threat of government censorship.[53] The second principle is based on a long-held view that the public should be exposed to diverse and vigorous expression with

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[49] *See* Reno v. ACLU, 117 S. Ct. 2329, 2347-48 (1997).

[50] *See id.* at 2349.

[51] *See* Roberts, *supra* note 45, at 133.

[52] *See* American Bookseller v. Webb, 919 F.2d 1493, 1499-1500 (11th Cir. 1990).

[53] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640 (1994).

minimal government regulation.[54] In other words, "the government may not reduce the adult population . . . to reading only what is fit for children."[55] While the government is usually barred from creating restrictions on speech, it does have limited authority to do so to serve important government interests, including the protection of minors.[56] But, the government is strictly limited in its abilities to curb protected speech.[57]

If the Supreme Court applies the strict scrutiny standard to a restriction on speech, the Court's next step would be to determine whether the challenged laws are "narrowly tailored" or the "least restrictive means" to serve "compelling" governmental interests.[58] Regardless of which standard the Court has chosen to analyze speech restrictions the Court has consistently weighed the benefits of the regulation against their impact on adult access to protected speech.[59]

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[54] *See* Board of Educ. v. Pico, 457 U.S. 853, 859 (1982) (the right to receive ideas is a necessary predicate to the recipients meaningful exercise of his own rights of speech, press and political freedom). *See also Turner,* 512 U.S. at 640.

[55] Virginia v. American Bookseller's Ass'n., 484 U.S. 383, 389 (1988) (citing Butler v. Michigan, 352 U.S. 380, 383-84 (1957)).

[56] *See* Ginsberg v. New York, 390 U.S. 629, 636 (1968) ("[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. . . . Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community . . . . "). *See also*, Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.").

[57] The government's interest in restricting a minor's access to sexually explicit information cannot exist at a cost of restricting adult's access to the same material. *See e.g.,* American Booksellers v. Webb, 919 F. 2d 1493, 1501 (11th Cir. 1990) (indicating that the crucial inquiry is whether the restriction of adults' access to protected speech is unnecessarily burdensome or "significant," thereby unduly restricting alternate modes of adult access).

[58] *Sable*, 492 U.S. at 126.

[59] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (plurality). *See also Sable,* 492 U.S. at 131.

1. Labeling Is Informative

Labeling provides a means for the government to increase the information available to users on the Internet. A rating system should function the same way as a nutrition label that indicates the carbohydrate or fat content of food.[60] The label should be informative rather than judgmental. A descriptive, but neutral, labeling system would not aim to reduce the amount of sexually explicit, indecent, obscene, or undesirable material available to adults, but merely to limit the amount that reaches children. A rating system would do so, not by limiting what can be written on the Internet or what can be transmitted, but by setting up a comprehensive scheme that is minimally intrusive on speech interests but empowers parents to select what information reaches their children.

Those presently using filtering software have over-limited their own access to the Internet because any pages that are not labeled are automatically excluded. Labels enable Internet users to determine what they would like to see or read and what they prefer to block out. The fact that individuals can use the information in the labels to avoid undesirable speech from coming into their homes should not result in classifying the label as restrictive. Rather, the public should be able to choose what it wants to read, and labeling simply provides a tool for individuals to make these choices.

Because labels provide information, a court analyzing the proposed statute should not view the regulation under traditional content-based strict scrutiny analysis but under the intermediate scrutiny. Satisfying the compelling interest of protecting children from indecent material would diminish the concern that the rating system is content-directed, minimizing the need to apply strict scrutiny. A court should classify the proposed statute as an informative rule requiring web page composers to disclose facts beneficial to users. Under such analysis, a mandatory labeling statute meets constitutional requirements because the statute furthers the substantial government interests of restoring parental control and restricting minor's access to indecent and obscene images and text while not suppressing free speech.[61]

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[60] *See* Roberts, *supra* note 45, at 133-34.

[61] *See* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1183 (1997).

Because strict scrutiny should not apply, a perfect fit between the goal and the means of achieving it would no longer be required, though the language of narrow-tailoring remains roughly the same.[62] Thus, a properly designed PICS-type rating system should meet the requirements of the First Amendment. The rating program needed to effectuate a filtering system compels speech in its requirement of labeling, but in requiring these labels it encourages more free speech. It also meets the interest in promoting parental control of their children's protection from uncontrolled exposure.

In *Meese v Keene*,[63] the Court considered the constitutionality of the Foreign Agents Registration Act of 1938,[64] which required that certain foreign films designated as "political propaganda" be labeled as such when exhibited in the United States.[65] The district court in *Meese* held the statute to be an unconstitutional abridgment of speech, and stated that the "political propaganda label reflected a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse."[66] The court feared the likely "negative response to the label 'political propaganda' of a film."[67]

However, on appeal, the Supreme Court rejected the district court's argument and stated that the labeling requirement imposed no restriction on speech,[68] and that the exhibitors' proper response to the labeling should be combated with additional speech:

> Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the

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[62] *See* Christopher M. Kelley, *"The Spectre of a 'Wired' Nation":* Denver Area Educational Telecommunications Consortium v. FCC *and First Amendment Analysis in Cyberspace,* 10 HARV. J.L. & TECH. 559, 639 (1997) [hereinafter *Wired Nation*].

[63] 481 U.S. 465 (1987).

[64] 22 U.S.C. §§ 611-621 (1988 and Supp. IV 1992).

[65] *See Meese,* 481 U.S. at 470-71.

[66] Keene v. Meese, 619 F. Supp. 1111, 1123-26 (E.D. Cal. 1985), *rev'd* 481 U.S. 465 (1987).

[67] Stephen J. Kim, *"Viewer Discretion is Advised:" A Structural Approach to the Issue of Television Violence,* 142 U. PA. L. REV. 1383, 1410 (1994) [hereinafter *Viewer Discretion is Advised*].

[68] *See Meese,* 481 U.S. at 490 (indicating that Congress did not prohibit, edit, or restrain the distribution of advocacy material in a ostensible effort to protect the pubic from conversion, confusion or deceit.).

> import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful and accurate speech.[69]

This reasoning applies to labeling speech on the Internet as an informational tool rather that a restriction on content. Thus, requiring a descriptive label stating the contents of the page such as "contains full frontal nudity" is less constitutionally problematic than requiring the statement "this speech is indecent and obscene and should not be viewed by those under 18."[70] The former simply provides a description of the content while the latter communicates a judgment of the material.

Further, in *Sable Communications, Inc. v. FCC*, the Supreme Court indicated that rules restricting access to "dial-a-porn" messages by requiring access codes, credit cards, and scrambling would be upheld if the restrictive measures permitted adult access to the material.[71] The proposed federal statute allows parents to disable a minor's access but does not restrict adult access to any material on the Internet. Under *Sable*, the proposed federal statute should be deemed constitutional.

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[69] *Id.* at 480-81 (footnotes omitted).

[70] *Id.* at 471.

[71] 492 U.S. 115, 130-31 (1989). *Sable* addressed the FCC content ban on obscenity and indecency for dial-a-porn services. The Court upheld the ban on obscene material but struck the ban on indecent communications as over-broad. The court held that mechanisms such as access codes provided a sufficient barrier to prevent a minor's exposure to the messages.

> [T]he FCC's technological approach [credit card, access code, and scrambling rules] to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. If this is the case . . . § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. . . . [Instead it] has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear.

Id.

In the past, the government has enacted informative statutes that have been held as constitutional. The most well-known examples of mandatory informative labeling regulations are the disclosure and warning labels required with respect to cigarettes,[72] alcoholic beverages,[73] and food and drugs.[74] The labels on these products serve the government's compelling interest of promoting public health, providing objective factual information, and discouraging health-endangering behavior.[75] Similarly, the labels on Internet web page sites provide factual information to parents and users allowing an effective means of filtering that serves the government's and society's interest in protecting children from exposure to indecent, objectionable, or obscene material.

In *American Booksellers v. Webb,*[76] the 11th Circuit stated that because the display of sexually explicit magazines in retail stores resulted in a secondary harm to children, a regulation that stores must place such magazines in opaque materials was justified.[77] This opaque material placed a type of label on a magazine that allows a consumer to know the type of information in the magazine before purchasing it, and thus restricts minors from viewing or purchasing such magazines.

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[72] See 15 U.S.C. §§ 1331-1341 (1988 & Supp. IV 1992) for the government's disclosure requirements for labeling cigarettes. The government requires a cigarette manufacturer, or packing companies to place on the cigarette box one of the four listed Surgeon General's Warnings.

[73] For the government's disclosure requirement for alcohol beverages, see 27 U.S.C. § 215 (1988) (requiring an alcoholic beverage to contain the Government warning listed in the statute). *See also,* 27 C.F.R. § 7.22 (1993) (requiring mandatory labeling information for malt beverages such as brand name, class, name and address, net content, and alcoholic content statement as to coloring material); 27 C.F.R. § 5.32 (1993) (requiring mandatory labeling information such as brand name, class and type, and alcoholic content for distilled spirits).

[74] For the government's disclosure requirements for food and drug labels, see 21 U.S.C. § 352 (1988 and Supp. IV 1992). *See also*, 21 C.F.R. § 101.2 (1994) (delineating what information should appear on the information label); 21 C.F.R. § 101.9 (1994) (listing the requirements and restrictions for food nutritional labels).

[75] *See* Alexandra A.E. Shapiro, *Title X, The Abortion Debate, and The First Amendment,* 90 COLUM. L. REV. 1737, 1761 n. 159 (1990).

[76] 919 F.2d 1493 (11th Cir. 1990).

[77] *See id.* at 1502 ("The 'secondary effects' of materials protected for adults but obscene to minors stem from the impact of in-store access to such material by minors.").

The proposed statute would provide the same result on the Internet as placing magazines in opaque wrapping. Parents, using the labels in conjunction with a filtering program, can prevent their children from accessing sexually explicit or undesirable information. Similar to parents purchasing the sexually explicit magazines for their children, parents can decide not to use the blocking system or subsequently "unblock" the system for their child to access a site. Whether parents choose to block the site or not, adults continue to have unrestricted access to labeled information on the Internet.

Laws regulating the issuance of securities further demonstrate the government's ability to require individuals to provide information to the consumer. The Securities Act of 1933 and the Securities Exchange Act of 1934 compel disclosure of information about securities to potential investors, including disclosure of various types of information pertaining to businesses whose shares are to be publicly offered.[78] The Securities and Exchange Commission requires the disclosure of a company's financial information in Forms 10-K, 10-Q, 10KSB and 10 QSB, and the filing of registration statements in Forms S-1, S-2, and S-B-2.[79] These documents provide investors and other users with information relevant to an assessment of the financial condition of the company and results of operations of the issuer, determined by evaluating the amounts and certainty of cash flows from an operation and outside sources.[80] Schedule 14A, under the Securities Exchange Act of 1934 lists twenty-one other disclosures that are required in a proxy

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[78] 15 U.S.C. §§ 78(a), 12(b) require disclosure of the organization, financial structure and nature of a business; the terms, position, rights and privileges of the different classes of securities outstanding; the terms on which the securities are to be offered to the public; remuneration, other than to directors and officers, exceeding $20,000 per annum; management and services contracts; options existing or to be created in respect of their securities; material contracts, not made in the ordinary course of business, which are to be executed in whole or in part at or after the filing of the application; balance sheets for not more than the three preceding fiscal years; profits and loss statements for not more than the three preceding fiscal years and any further financial information.

[79] *See* 17 C.F.R. § 229.303 (1993) requires that management provide information about liquidity, capital revenue and results of operation for four full fiscal years.

[80] *See* Amy Bowerman Freed, *Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A")*, SB39 ALI-ABA 171, 173 (1996).

statement.[81] The required disclosure of financial information in the above rules and regulations provides the facts necessary for the investor to make an informed decision about the stock he wishes to purchase. Similar to the disclosure requirements for securities, the proposed labeling statute provides the means by which a user can make an informed decision about which material a user deems appropriate for himself or for a child to view.

Critics of the rating systems parallel rating the Internet to rating books in libraries. The critics' underlying assumption that one has unlimited exposure to books in a library is incorrect. Librarians determine what books will and will not be purchased or displayed at a particular library, which books to retire and which to rebind and restack. Further, the analogy is not a direct one, because books are already classified both by their title and by the location in the library (fiction, nonfiction, biography, adult). Children do not have direct access to books that are labeled as adult. Many books that are deemed, by librarians instead of parents, undesirable for children, particularly indecent material, are kept out of main circulation and must be requested. Thus, there is no compelling interest in rating books because adult books are restricted from access to children. If a book is rated as indecent and placed behind the library counter, a child could not check it out. Further, unlike the Internet, parents can control what their children are reading by not taking them to an adult book store and by simply looking at the books that have been checked out.

In determining the constitutionality of the proposed statute, a court relying on *Meese* and *Sable,* as well as the alcohol, food, drug and securities regulations, should hold that the proposed statute meets the requirements of the First Amendment. The proposed statute furthers a substantial governmental interest, does not burden substantially more speech than is necessary to further the interest, and provides the narrow means for protecting minors from sexually explicit information on the Internet while allowing adult users unrestricted use.[82]

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[81] *See* 17 C.F.R. § 240.14(a). These disclosures include: beneficial ownership, calculation of beneficial ownership, biographical data on directors and executive officers, and certain legal proceedings involving insiders

[82] *See "Viewer Discretion is Advised", supra* note 67, at 1411; *see also,* Allison L. Wapner, *Stay Tuned, Violence Can't Be Unplugged: The Parental Choice in*

2. Labeling Is Not Content-Restrictive

The First Amendment not only restricts the government's ability to abridge expression, but also limits the government's ability to compel expression.[83] Individuals who classify labels as compelled speech propose several reasons for this classification. First, requiring the composer to label may impose a direct penalty on expression. In *Riley v. National Federation of the Blind*,[84] the Supreme Court considered legislation requiring professional fund-raisers to disclose financial information to potential donors.[85] The Supreme Court stated that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content based regulation of speech."[86] In *Riley*, the state argued that the requirement of disclosure warranted less careful scrutiny than traditional restrictions on expression.[87] The *Riley* court rejected the state's argument by saying,

> [t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say.[88]

The second reason to classify labels as compelled speech or content-based restrictions is that the use of labels restricts or suppresses free speech.[89] Because the web page carries a label, the label may be-

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Television Act of 1995 (H.R. 2030), 6 DE PAUL-LCA J. ART & ENT L. 61, 63 (1995). The FCC's safe harbor rule which provides that the "hours between midnight and six in the morning are 'safe harbor' hours during which broadcasters can air programs that are generally inappropriate for a child audience" has been upheld by the U.S. Supreme Court. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

[83] Virginia State Bd. of Educ., v. Barnette, 319 U.S. 624, 635 (1943).

[84] 487 U.S. 781 (1988).

[85] *See id.* at 784-803.

[86] *Id.* at 795.

[87] *See id.*

[88] *Id.* at 796-97. *See also*, Talley v. California, 362 U.S. 60, 62, 65 (1960) (declaring void an ordinance that restricted the distribution of a handbill that did not identify the name and address of the author or manufacturer).

[89] *See Viewer Discretion is Advised, supra* note 67, at 1400.

come a stigma that may effectively repel readers. Thus, a content-based label results in the censorship of certain information on the Internet based on its contents.[90]

However, the proposed statute's labeling requirement would not stigmatize the composer because the state is not censoring what the writer is saying but is allowing the individual to choose, through filtering, what she receives. The goal of the statute is to create a rating scheme that would describe what is on the site and not engage in value-based judgment of the information. Further, under the proposed statute, the web page composer's First Amendment right of free speech is not restricted because the composer is still entitled to post his information; he need only choose a category in the rating scheme that matches his site's content. This is similar to placing a title on a piece. Usually the title of an article describes, in a summarized fashion, what the article is about. Likewise, a label will provide a technical means to place a title on the piece that can be "read" by the reader's chosen filtering software. This would allow the reader, through filtering software, to decide not to read the information in the web site based on its category.

Classifying the proposed statute as a content-based restriction or not depends on the principal inquiry "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[91] Often the regulation's purpose will be evident from reading the statute.[92] The court in *Turner* states that "[A]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[93] The proposed federal mandatory de-

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[90] *See* American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950). [T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.

Id.

[91] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

[92] *See id.* (citing Frisby v. Schultz, 487 U.S. 474, 481 (1988)).

[93] *Id.* at 643.

scriptive labeling statute does not distinguish favored speech from disfavored speech as stated in *Turner*.

Classifying the proposed statute as a content-based regulation would subject the statute to strict judicial scrutiny.[94] If classified as content-based, the government would have to show the legislation fulfills a compelling state interest and is narrowly tailored[95] to serve that interest without impacting other speech protected by the First Amendment.[96] Most cases striking down speech restrictions rely primarily on the narrow-tailoring prong, which the court states contains four components: advancement of the interest,[97] no over-

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[94] *See* Simon and Schuster, Inc. v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 119-20 (1991) (applying the strict scrutiny analysis to content based "Son of Sam" law). *See also,* Sable Communications, Inc. v. FCC., 492 U.S. 115, 126 (1989) ("[To] regulate the content of constitutionally protected speech in order to promote a compelling interest [the government must choose] the least restrictive means to further the articulated interest."); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §12-3, at 798-99 (2d ed. 1988) (discussing the application of strict scrutiny analysis).

[95] *See, e.g.,* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 655 (1990); Boos v. Barry, 485 U.S. 312, 334 (1988) (plurality); *see also,* Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality). Most cases striking down speech restriction rely primarily on the narrow tailoring prong which contains four components: no over-inclusiveness, least restrictive alternative and no under-inclusiveness. *See e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

[96] *See Sable*, 492 U.S. at 126. *See also*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[97] *See, e.g.,* Meyer v. Grant, 486 U.S. 414, 426 (1988); Buckley v. Valeo, 424 U.S. 1, 45-47 (1976); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 262 (1986).

inclusiveness,[98] least restrictive alternative,[99] and not under-inclusive.[100]

Although the First Amendment provides for the right to free speech, that right is not absolute. There are certain well-defined and narrowly limited classes of speech to which First Amendment protection has been held inapplicable, such as obscene material.[101] First Amendment protection applies to all other forms of speech that do not fall within the "well-defined and narrowly limited classes of speech."[102] However, this protection is not absolute either. For example, the court has determined that a state has a compelling interest in safeguarding the physical and psychological well-being of a minor.[103] Therefore, the government may restrict indecent speech directed at minors only if that regulation provides a compelling interest and is narrowly tailored to achieve that interest.[104]

Under a strict scrutiny analysis, a labeling statute for the Internet may pass this high standard of constitutional scrutiny if analogized to the exception in the broadcast area. There, the Court held that special circumstances of the medium justify a content-based restriction.[105] For example, in *FCC v. Pacifica Foundation*,[106] the Court upheld the Commission's authority to regulate broadcast-radio programming to protect the interests of children. The Court cited two factors that justi-

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[98] *See, e.g., Simon & Schuster*, 502 U.S. at 120-121; FEC v. National Conservative Political Action Comm., 470 U.S. 480, 500-01 (1985).

[99] *See, e.g., Sable*, 492 U.S. at 126 (stating that a law is not narrowly tailored if there are less speech restrictive means available that would serve the interest essentially as well as would the speech restriction); *Boos*, 486 U.S. at 329; *Meyer*, 486 U.S. at 425-28; *Burson*, 504 U.S. at 206 (indicating that the government need not choose an alternative that falls short of serving the compelling interests).

[100] *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989); Carey v. Brown, 447 U.S. 455, 465 (1980); Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987). *See also* Volokh, *supra* note 95.

[101] *See* Roth v. United States, 354 U.S. 476, 476 (1957). *See also* Miller v. California, 413 U.S. 15, 24 (1973); New York v. Ferber, 458 U.S. 747, 763-65 (1982) (holding that child pornography is per se obscene).

[102] Chaplinksy v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[103] *See,* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

[104] *See id.*

[105] *See id.*

[106] 438 U.S. 726, 748 (1978).

fied the restriction of indecent materials to times when children would not be in the audience. These were: 1) the uniquely pervasive presence of the broadcast media; and 2) the easily accessible nature of broadcast materials to children.[107] These rationales also apply to the Internet. Thus, the government's legitimate interest in protecting users and its duty to regulate the content allows the descriptive labeling of Internet web pages.

In addition, the U.S. Supreme Court in *Pacifica* permitted a content-based speech restriction that confined indecent, non-obscene speech to hours when children are unlikely to be in the audience.[108] The Court did, however, strike down outright bans on such speech under a traditional strict scrutiny test.[109] Using the rationale of *Pacifica*, a court could classify speech on the Internet as a category of protected speech and classify the proposed statute as content-restricting. Thus, the Court would likely invalidate the proposed statute as a content-restricting statute on the basis that it unconstitutionally restricts protected expression. The holding in *Pacifica* presents the government with a tough, yet not impossible, burden in demonstrating both its compelling interest and the required fit between the means and ends.

However, recently, the Supreme Court in *Denver Area Educational Telecommunications Consortium Inc. v. FCC*,[110] altered is approach by upholding section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992.[111] This act permits cable system owners to ban indecent speech on cable channels set aside for independent commercial use, including leased access channels.[112] Yet, the Court struck down section 10(b) of the 1992 Cable Act, which required cable operators to ban indecent speech on cable channels set aside for public, educational, or governmental use through segregated

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[107] *See id.* at 748-50 .

[108] *See id.* at 750.

[109] *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 131 (1989). Under a strict scrutiny test a content-based regulation that burdens protected speech must be narrowly tailored to achieve a compelling government interest. *See id.* at 126.

[110] 116 S. Ct. 2374 (1996).

[111] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

[112] *See* 47 U.S.C. § 532(h) (1994).

and block methods. The Court stated that section 10(b) was not narrowly or reasonably tailored to protect children.[113]

Writing for the majority,[114] Justice Breyer refused to specify whether strict scrutiny or a lesser standard was the appropriate standard for evaluating the constitutionality of indecent speech in general, and in particular section 10(b)'s content-based "segregate and block" requirement.[115] Instead, the Court held that section 10(b) was unconstitutional under both standards.[116] The Court found that section 10(b) failed strict scrutiny because it was not the least restrictive alternative to achieve the government's compelling interest in protection children from indecent programming.[117]

The Court followed no established rule in reaching different outcomes on section 10(a) and section 10(b). Instead, the Court employed an ad hoc balancing test to evaluate the constitutionality of each subsection. This ad hoc analysis raises serious doubts about the Court's commitment to protect the speech interest of cable operators, programmers and viewers.[118] *Denver Area* provides more support for the view that a descriptive rating system would be upheld. The vague, but somewhat positive, mention of the V-Chip[119] as a potentially less re-

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[113] *See Denver Area*, 116 S. Ct. at 2394. *See also* 47 U.S.C. § 551.

[114] Justices Stevens, O'Connor, Kennedy, Souter, and Ginsburg joined Part IV of Justice Breyer's opinion that determined section 10(b) to be unconstitutional. *See id.* at 2380, 2394-96.

[115] *See id.* at 2391. The Court normally applies strict scrutiny to content based restriction on protected speech. *See, e.g.*, Turner Broad. Sys. Inc., v. FCC, 512 U.S. 622, 641-42 (1994). The Court has applied "less than-strictest- First Amendment Scrutiny to content-neutral regulation of cable and regulations of commercial speech." *See Denver Area*, 116 S. Ct. at 2391-92. The Court has not resolved whether indecent speech is also subject to this less strict standard of review. *See id.* at 2391.

[116] *See Denver Area*, 116 S. Ct. at 2391, 2394.

[117] *See id.* at 2390-91. § 10(b) requires "the operator to place the patently offensive leased channel programming on a separate channel; to block that channel; to unblock [it] within 30 days of the subscriber's written request and to reblock it within 30 days of the subscribers request for reblocking." The Court held that the writing requirement was not the least restrictive method because the record did not answer why blocking alone does not adequately protect children. *Id.* at 2391-92.

[118] *See Leading Cases* 110 HARV. L. REV. 135, 246 (1996).

[119] The V-Chip inventor originally intended that the "V" would stand for "viewer control" but it has generally been taken to signify "violence" in the United

strictive alternative to section 10(b) in both Justice Breyer's plurality opinion[120] and Justice Souter's concurrence[121] suggests that the Court considered the V-chip more acceptable than some other regulatory possibilities.

This change in the Court's position from a highly protective stance on freedom of speech to a loose standard could severely impact how speech on the Internet will be treated. In the *Reno v. ACLU* decision, the Court implied that a labeling and filtering system, if properly implemented, would be constitutional.[122] Therefore, the possibility of enacting a statute that does not limit what is written or transmitted on the Internet but allows a person to limit what they receive exists.

The Court's holding in *Denver Area* indicates that even analyzing the statute as content-based may not automatically rule the statute unconstitutional. The statute may be constitutional if it is the least restrictive means to accomplish the government's interest. The proposed statute meets the requirements of *Denver Area* because it allows a user to block sites he deems offensive while not restricting access to those who do not wish to pay attention to the labels. In addition, the proposed labels do not interfere with the access of a user who wishes to ignore the labels and not purchase filtering software. Thus, even assuming the statute is a content-based restriction, the statute is narrowly tailored and uses the least restrictive alternative to achieve the government's compelling interest.

Further, in *Sable Communication of California v. F.C.C.*, the Supreme Court held the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest

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States. *See* Dirk Smillie, *TV Ratings Rate Poorly With V-Chip Inventor and Father of Three*, CHRISTIAN SCI. MONITOR, Feb. 27, 1997, at 14. The V-Chip allows for automatic screening out of violent programming. Christopher M. Kelly, *The Spectre of a 'Wired' Nation": Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J.L. & TECH. 559, 630 (1997). This device has also raised First Amendment concerns as an extensive governmental intrusion into the speech marketplace. *See id.*

[120] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2392 (1996) (plurality)

[121] *See id.* at 2402 (Souter, J., concurring).

[122] *See* 117 S. Ct. 1229, 2333, 2340, 2349 (1997).

if it chooses the least restrictive means to further the articulated interest."[123] In other words, the government may serve the legitimate interest of protecting the well-being of children, but it must do so by narrowly drawn regulations devised to serve those interests without unnecessarily interfering with the First Amendment freedom and the statute must be tailored to achieve the desired ends.[124]

The proposed statute meets the *Sable* test in at least two respects. Firstly, the statute is narrowly tailored to provide information to the user through the use of labels while providing unrestricted use and access to the user of the Internet forum. Secondly, the proposed statute is the least restrictive means to achieve the government's goal because it in no way restricts or impedes the use of the medium for a user who wishes to ignore the labels. The labels exist as a source of information that can either be used in connection with filtering software to block those sites that parents or users deem undesirable for themselves or minors, or ignored.

In conclusion, a mandatory labeling requirement is constitutional because the descriptive label is content-neutral, serves a compelling governmental interest, and is narrowly tailored so as to not restrict free speech. The labeling enables individuals to purchase and implement blocking software which filters, not censors, the information received on their computers at home. Instead of prohibitively restricting access to the Internet, the proposed statute provides a user with knowledge sufficient to make an informed decision based on the web page label.

IV. CONSTRAINTS ON THE EFFECTIVENESS OF THE STATUTE

U.S. law currently does not impose any requirements for labeling of web pages. However, the proposed federal mandatory labeling statute would bind all citizens subject to United States jurisdiction. Even if the U.S. imposes the statute, and the statute is constitutional, it may not produce the desired results because the Internet is predomi-

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[123] Sable Communications, Inc., v. FCC, 492 U.S. 115, 125 (1989).

[124] *See id.*

nantly a self-regulating system.[125] National regulation would produce a limited result due to the international nature of the Internet.[126]

In addition, the Internet is a complex, anarchic and multinational system.[127] While it is probably within the power of the U.S. government to prosecute those persons who violate the statue domestically, the government does not have the power to impose such a regulation outside its jurisdiction. Thus, users could access unlabeled foreign sites. There is little that one country can do to keep out information from any other country from coming into the U.S. and from U.S. information being transmitted overseas. A solution to this problem would be to allow parents to code their software to block any unrated site. Thus, foreign sites that are not required to place a label on the heading will not be read by the filtering system and will automatically be blocked out. This prevents ingenious minors from accessing the foreign sites to which the U.S. labeling law does not apply.

IV. CONCLUSION

The United States government can constitutionally require a web page composer to label his web page on the Internet. Technically and constitutionally, the proposed statute meets all the requirements necessary to impose such a requirement on web page composers. Technically, the software necessary to implement the proposed statute exists. PICS provides an example of how parents can use a labeling software system in conjunction with a filtering system to block sites deemed undesirable.

Constitutionally, the proposed statute meets the requirements of protecting the First Amendment's freedom of speech. In requiring a descriptive label, the statute's purpose is to provide information to the reader and not to restrict, judge or stigmatize the content of the web page. The proposed statute allows the continued unrestricted use of the Internet to adults and instead, along with the necessary software, provides the means by which a user can effectively block or filter any

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[125] *See* A. Michael Froomkin, *Flood Control on the Information Ocean: Living With Anonymity, Digital Cash and Distributed Databases*, 15 J.L. & COM. 395, 443 (1996).

[126] *See* Akdeniz, *The Regulation of Pornography, supra* note 33, at 8.

[127] *See id.*

program she deems undesirable for herself or her children. Based on previous use of such content-neutral statutes and on the Supreme Court's analysis in similar cases, the proposed statute should be deemed constitutional.

Lastly, should the Supreme Court decide to analyze the proposed statute under strict scrutiny, the statute is still constitutional. The statute is narrowly-tailored and provides the least restrictive means to achieve the government's compelling interests of protecting children from sexually explicit information and allowing parents to retain control of what their child has access to in the home. The proposed federal mandatory descriptive labeling statute only requires the web page composer to label the page and does not restrict what the web page composer writes nor what the user reads. The statute provides the means by which a user can effectively evaluate the content of the page and determine if the user wishes to read what is contained on the site. It is a form of self-censorship and freedom of choice, not a form of state-imposed abridgment of free speech.